In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 35

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TEXTILE WORKERS UNION OF AMERICA, CIO, AND ITS AGENTS EARL MCGREW AND FRANK R. METZGER, AND LOCAL 1172, TEXTILE WORKERS OF AMERICA, CIO, AND ITS AGENTS FRANK R. METZGER, ANTON DVORSCAK, AND FRANK TURK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD RESPECTING MOOTNESS

The Solicitor General, on behalf of the National Labor Relations Board, respectfully calls to the Court's attention certain new facts which raise a possible question of mootness in this case, now awaiting argument on the merits. Although, in our judgment, these new facts do not render the case moot, we think it appropriate to inform the Court of these developments and of our views as to their effect, if any, on the status of the case.

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The history of the case is as follows: On May 5, 1954 ~~1944~~, the Board found, in relevant part, that the respondent Unions (and the named agents) who were then the bargaining representative of the employees of Personal Products Corporation [1] had violated Section 8 (b) (3) of the Act (R. 80–91), by engaging in slowdowns, intermittent stoppages and other disruptive conduct during the course of collective bargaining negotiations with the Company. It ordered (R. 90) the respondents, Textile Workers Union of America, and Local 1172, Textile Workers of America, CIO, their successors, assigns, officers, and representatives, and agents, including four named individuals, to cease and desist from

> Refusing to bargain collectively in good faith with the Company, by engaging in slowdowns and unauthorized extensions of rest periods; by [other specified conduct] or by engaging in any similar or related conduct in derogation of the statutory duty to bargain, in this order [sic] being conditioned upon Respondents remaining the representative of the employees in the unit herein found to be appropriate, subject to the provisions of Section 9 (a) and (c) of the Act.

Affirmatively, respondents were required upon request to

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[1] Respondent Textile Workers Union of America, CIO, was certified by the Board as the bargaining representative of these employees on February 12, 1951. Respondent Local 1172 was chartered by the Textile Workers on February 28, 1951; it admits to membership only employees of the Company and, jointly with respondent Textile Workers, acted as the bargaining representative of the employees during the events which give rise to this case (R. 20, 21, 22–27).

> bargain collectively with Personal Products Corporation so long as respondents remain the ~~the~~ representative of the employees in the unit found above to be appropriate, subject to the provisions of 9 (a) and (c) of the Act.

The court below, holding that respondents had not refused to bargain in violation of Section 8 (b) (3), as found by the Board, denied enforcement of those portions of the Board's order quoted above (R. 105–113). The Board's petition for certiorari was granted on April 2, 1956 (R. 116). 350 U. S. 1004.

On July 31, 1956, the Board, at the conclusion of representation proceedings, certified another union, United Textile Workers of America (AFL-CIO), as the representative of the employees of the Company. *Personal Products Corp.*, 116 N. L. R. B. No. 47. The latter union is not a successor nor is it associated with respondent unions, apart from their common affiliation with the AFL-CIO. This certification followed a closely contested election in which, after counting some challenged ballots, respondent Textile Workers Union of America, CIO received 58 votes and the certified union received 61 votes. Subsequently, respondent Textile Workers Union of America, CIO filed a motion requesting the Board to reconsider and withdraw the certification pending the disposition by the General Counsel of the union's appeal from the regional director's refusal to issue a complaint on charges that several employees whose votes were challenged in the representation proceedings were discriminatorily denied employment by the Company prior to the election, in which case their

votes should be counted. The Board denied this motion on September 14, 1956.

In view of the foregoing, the question may arise whether respondent unions' present lack of representative status renders moot the bargaining order which is the subject matter of litigation in the instant case. The general rule is that the Board is entitled to a decree of enforcement, even where the respondent has ceased violating the Board's order, as an assurance against recurrence of violations. "A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree. * * * The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices." *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, 567–568.[2] If, however, because of supervening facts, recurrence becomes an impossibility or an extremely remote contingency, the case may be deemed moot.[3]

In this case a possibility, by no means remote, exists that respondent Union may resume the status of bargaining representative in this plant. It is still actively functioning as a labor organization. Its loss of rep-

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[2] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307–312; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260.

[3] See, for example, *National Labor Relations Board* v. *Hollywood-Maxwell Co.*, 126 F. 2d 815, 823 (C. A. 9).

resentative status in this plant was by a two-vote margin in a vigorously contested election. We are informed that the Union is still actively interested in representing these employees whom it has represented for many years in the past. In these circumstances, it may reasonably be anticipated that the Union will once again make a bid for certification as bargaining representative when a year has elapsed.[4] A further contingency, admittedly speculative at the present time, is that the Union and the United Textile Workers, which are both affiliated with the AFL-CIO, may merge. If that should occur, it could provide a basis for making the order effective against the successor union. *National Carbon Co.*, 116 N. L. R. B., No. 68, 38 L. R. R. M. 1284.

Thus, it cannot be said here that recurrence of the acts barred by the Board's order is remote and unlikely, and that a decree of enforcement would serve no useful purpose. An injunction would insure against a repetition of violations in the event respondents resume the status of bargaining representative. The obvious fact that the immediate need for the injunction "may be less than when made" does not render the order moot. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. at 271.[5]

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[4] Under the Act, Section 9 (c) (3), elections may not be held more often than once a year.

[5] In the *Pennsylvania Greyhound* case, the Court rejected the contention that a Board order requiring the employer to disestablish a company-supported union was moot because of an intervening certification of another union.

The instant case appears to be no different, essentially, from the many cases which hold that the disappearance or abandonment of a company dominated or supported union does not moot an order requiring the employer to disestablish the organization and withdraw recognition from it. *National Labor Relations Board* v. *Saxe-Glassman Shoe Corporation*, 201 F. 2d 238, 244 (C. A. 1); *Harrison Sheet Steel Company* v. *National Labor Relations Board*, 194 F. 2d 407 (C. A. 7), enforcing 94 N. L. R. B. 81, 85; *National Labor Relations Board* v. *Lund*, 103 F. 2d 815, 821 (C. A. 8); *A. E. Staley Mfg. Co.* v. *National Labor Relations Board*, 117 F. 2d 868, 879 (C. A. 7). The suggestion of mootness in the cited cases has been rejected on the ground that the banned organization may reappear in the future.

Also relevant are the numerous cases where the courts have entered decrees enforcing Board orders, including affirmative and negative provisions, notwithstanding that the respondent employer has gone out of business. *National Labor Relations Board* v. *National Garment Company*, 166 F. 2d 233, 238–239 (C. A. 8); *National Labor Relations Board* v. *Acme Mattress Co.*, 192 F. 2d 524, 528 (C. A. 7); *National Labor Relations Board* v. *Somerset Classics*, 193 F. 2d 613, 615–616 (C. A. 2). The rationale of these decisions is that there should be some assurance against a repetition of the infractions in the event the defunct business is revived or reemerges in another form. "And these principles may be applied in fuller measure in furtherance of the public

interest, which here the [Board] represents, than if only private interests were involved" *Walling* v. *Reuter Co.*, 321 U. S. 671–675. The same general considerations apply here.

It may be suggested, however, that the Board's order by its express terms is operative only "so long as respondents remain the representatives," and hence the order by its own terms expired with respondents' loss of representative status. The Board's use of the word "remain" was not intended, however, to give the order such a limited scope. As noted above, Board orders normally impose a continuing obligation. The Board does not construe the order here as limited to the duration of the current certificate. In other cases involving union refusals to bargain the Board has normally required the union to cease and desist from refusing to bargain "so long as they are [or 'it is'] the representative."[6] No departure from this general practice was implied by use of the word "remain" in the order in this particular case.

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[6] *Chicago Typographical Union, No. 16*, 86 N. L. R. B. 1041, 1048; *International Typographical Union*, 87 N. L. R. B. 1418, 1426; *Local 1664, ILA*, 103 N. L. R. B. 1217, 1221. See also, *Harrison Sheet Steel Co.*, 94 N. L. R. B. 81, 84 (order requiring the employer to disestablish "the Employee Representative Plan in the event that it return to active existence"). *Local 688, Teamsters' Union*, 116 N. L. R. B. No. 115, 38 L. R. R. M. 1345 (order enjoining union from engaging in unlawful strike for recognition, notwithstanding employer's recognition of the union).

Accordingly, in our view the instant case has not become moot.

Respectfully submitted.

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MEMORANDUM FOR TEXTILE WORKERS UNION OF AMERICA RESPECTING THE QUESTION OF MOOTNESS

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